

NOTES

PROTECTION OF THE SURVIVING SPOUSE'S STATUTORY SHARE AGAINST INTER VIVOS TRANSFERS BY THE DECEDENT*

SUBSTITUTION of the statutory share for dower,¹ to afford a surviving spouse some economic security,² raises questions concerning the validity of inter vivos transfers by the decedent in an attempt to defeat the other spouse's share. Unlike inchoate dower,³ the statutory share places no limitations on inter vivos transfers, but gives to each spouse a share in the estate of the other at death which cannot be destroyed by testamentary disposition.⁴ The interest which one spouse has in the other's estate is an expectant interest and is wholly contingent on the decedent's leaving an estate.⁵ One spouse can, therefore, deprive the other of his or her statutory share by absolutely disposing of his property before death;⁶ but the unwillingness of an individual to render himself destitute is thought sufficient to prevent this. A difficult problem is presented, however, when a married person attempts to divest himself of his property in such a way as to deprive the spouse of a share in his estate and yet in fact retains the control of it during his lifetime.⁷

No satisfactory criterion has been developed by the courts to determine whether an inter vivos transfer, effective between the transferor and the trans-

* *Inda v. Inda*, 288 N. Y. 315, 43 N. E. (2d) 59 (1942).

1. The statutory share has been adopted in thirty-one states and in the District of Columbia and Hawaii. For a catalogue by states of the statutory provisions, see 3 VERNIER, *AMERICAN FAMILY LAWS* (1935) §§ 188, 189. In New York dower was abolished after August 31, 1930, by the Real Property Law. See N. Y. Laws 1929, c. 229, § 190. All distinction between real and personal property as to inheritance was also abolished and the surviving spouse was given a distributive share in the estate of the deceased. See N. Y. Laws 1929, c. 229, §§ 18, 83. For a discussion of the advantages of the statutory share as opposed to dower, see Note (1937) 46 *YALE L. J.* 884, 886.

2. See N. Y. Laws 1929, c. 229, § 20. See also Original Report of the Commission to Investigate Defects in the Laws of Estates, New York Leg. Doc. No. 70 (1928) 83; (1941) 10 *BROOKLYN L. REV.* 424.

3. See *Wright v. Holmes*, 100 Me. 508, 515, 62 Atl. 507, 510 (1905); *Poole v. Poole*, 129 Md. 387, 390, 99 Atl. 551, 553 (1916). See also Original Report of the Commission to Investigate Defects in the Laws of Estates, *supra* note 2; 3 VERNIER, *AMERICAN FAMILY LAW* (1935) 349. For a discussion of the restrictions imposed by dower on the alienability of land, see WALSH, *THE LAW OF PROPERTY* (1927) 185; (1938) 12 *ST. JOHN'S L. REV.* 355.

4. See *Matter of Byrnes*, 260 N. Y. 465, 184 N. E. 56 (1933); *In re Blumenstiel's Will*, 248 App. Div. 533, 290 N. Y. Supp. 935 (4th Dep't 1936); *In re Bommer's Estate*, 159 Misc. 511, 288 N. Y. Supp. 419 (Surr. Ct. 1936).

5. See *Newman v. Dore*, 275 N. Y. 371, 376, 9 N. E. (2d) 966, 967 (1937).

6. See *Krause v. Krause*, 285 N. Y. 27, 32 N. E. (2d) 779 (1941); *Marine Midland Trust Co. of Binghamton v. Stanford*, 256 App. Div. 26, 9 N. Y. S. (2d) 648 (3d Dep't 1939), *aff'd*, 281 N. Y. 760, 24 N. E. (2d) 20 (1939).

7. In such cases the transfers are usually made without consideration. See Note (1937) 46 *YALE L. J.* 884.

feree,⁸ should be set aside as in derogation of the surviving spouse's statutory share.⁹ Some courts hold that subjective intent to defeat the interest of the surviving spouse is sufficient to nullify it.¹⁰ By the test adopted in New York and in the majority of jurisdictions, however, the validity of a transfer is determined by whether it is real or illusory; by whether the decedent in good faith divested himself of the ownership of the property.¹¹ But the nature of the test is not clear. Although the New York Court of Appeals has talked confusingly in terms of intent, saying that the good faith required refers to the intent to divest oneself of ownership,¹² this language appears to have been used to emphasize that intent to deprive the surviving spouse of his statutory share is immaterial.¹³ Other discussion indicates that the only intent involved is that manifested by the acts of the decedent, that is, objective rather than subjective intent.¹⁴ The test would thus seem to be whether the decedent did in fact divest himself of ownership. Once it is established either that ownership was or was not relinquished, objective intent can be found in the assumption that a person must intend the natural consequences of his acts. Yet no rule is presented by which to determine what transfers are real and what illusory, for the court has refused to say how far a spouse must divest himself

8. No problem arises when the transfer is invalid as between the transferor and the transferee, for the property remains part of the estate at death.

9. For a discussion of the devices used and the reaction of the courts to them, see Note (1937) 46 YALE L. J. 884.

10. See *Payne v. Tatem*, 236 Ky. 306, 33 S. W. (2d) 2 (1930); *Dyer v. Smith*, 62 Mo. App. 606 (1895); *Crecelius v. Horst*, 4 Mo. App. 419 (1877); *Evans v. Evans*, 78 N. H. 352, 100 Atl. 671 (1917); *Nichols v. Nichols*, 61 Vt. 426, 18 Atl. 153 (1889); *Thayer v. Thayer*, 14 Vt. 107 (1842). See Cahn, *Restraints on Disinheritance* (1936) 85 U. OF PA. L. REV. 139, 150. For a criticism of the intent rule, see *Newman v. Dore*, 275 N. Y. 371, 376, 379, 9 N. E. (2d) 966, 967, 969 (1937); (1938) 5 U. OF CHI. L. REV. 504.

11. See *Newman v. Dore*, 275 N. Y. 371, 9 N. E. (2d) 966 (1937); *Small v. Small*, 56 Kan. 1, 42 Pac. 323 (1895); *Leonard v. Leonard*, 181 Mass. 458, 63 N. E. 1068 (1902); *Wright v. Holmes*, 100 Me. 508, 62 Atl. 507 (1905); *Potter Title & Trust Co. v. Braum*, 294 Pa. 482, 144 Atl. 401 (1928).

12. See *Newman v. Dore*, 275 N. Y. 371, 379, 9 N. E. (2d) 966, 969 (1937).

13. *Ibid.*

14. *Ibid.* The court described the real-illusory test as that applied in *Leonard v. Leonard*, 181 Mass. 458, 63 N. E. 1068 (1902). In that case and the cases cited there intention was mentioned, if at all, only to emphasize its irrelevance. Moreover, the court in the *Newman* case, professed to apply the test as it is formulated in most jurisdictions. And in most jurisdictions, where the test is applied, intention has no part in it. See *Williams v. Williams*, 40 Fed. 521 (C. C. Kan. 1889); *Phillips v. Phillips*, 30 Colo. 516, 71 Pac. 363 (1903); *Stewart v. Stewart*, 5 Conn. 317 (1824); *Poole v. Poole*, 96 Kan. 84, 150 Pac. 592 (1915); *Small v. Small*, 56 Kan. 1, 42 Pac. 323 (1895); *Rabbitt v. Gaither*, 67 Md. 94, 8 Atl. 744 (1887); *Jones v. Somerville*, 78 Miss. 269, 28 So. 940 (1900); *Farrell v. Puthoff*, 13 Okla. 159, 74 Pac. 96 (1903); *Lines v. Lines*, 142 Pa. 149, 21 Atl. 809 (1891). But see *Brown v. Crafts*, 98 Me. 40, 56 Atl. 213 (1903). Furthermore, the language used by the Court of Appeals indicates that the acts of the decedent are alone important and that the intention referred to is merely that shown by them. See *Newman v. Dore*, 275 N. Y. 371, 381, 9 N. E. (2d) 966, 969 (1937).

of his interest in his property to render a transfer more than illusory.¹⁶ The holdings in the *Newman*¹⁶ and *Krause*¹⁷ cases signify, however, that a transfer will be deemed illusory if the decedent retains power to revoke it and controls the property and receives the income from it, while a transfer will be called real if it is irrevocable even though control and income are reserved. From these propositions no conclusion can be drawn as to whether a power of revocation would alone be sufficient to render a transfer illusory.¹⁸

A recent case adds new confusion.¹⁹ Albert Inda was married in 1890 and died intestate in 1940, leaving his wife, Anne, and ten children. In 1935 he opened two savings bank accounts: one in the names of "Wojciech Panowicz or Victoria J. Inda—Joint Account either or survivor may draw"; and the other, in the names of "Wojciech Panowicz or Andrew P. Inda—pay to either or survivor of them." Wojciech Panowicz was a fictitious name given the banks by Albert Inda. The decedent's wife brought an action to recover the monies in these accounts on the theory that the deposits were illusory transfers and therefore ineffective to deprive her of her expectancy as widow under the Decedent Estate Law. It was found by the trial court that the transfers were in fact illusory since Albert Inda always treated the accounts as his own sole property and never intended to nor did divest himself of the complete ownership of the funds in them. The New York Court of Appeals concluded, however, that this finding was immaterial²⁰ and that under the Banking Law²¹ the existence of a joint tenancy was conclusively presumed by the form of the deposits.²² Without discussion it then assumed that the creation of such a tenancy constituted a real transfer and could not be set aside.

At first sight it would appear that because of the Banking Law an application of the real-illusory test necessarily deprived the widow in the instant case of the interest the Decedent Estate Law intended her to have. The court was not, however, compelled by the Banking Law to declare absolute a transfer which was in fact illusory. In its interpretation of the Banking Law the court seems to have followed two previous cases²³ in which it was said that a deposit in the form prescribed by the statute creates during the joint lives

15. See *Newman v. Dore*, 275 N. Y. 371, 381, 9 N. E. (2d) 966, 969 (1937).

16. *Ibid.*

17. *Krause v. Krause*, 285 N. Y. 27, 32 N. E. (2d) 779 (1941).

18. In Pennsylvania it would not. There a transfer has been held real although the decedent retained power of revocation, income from the property, and a large measure of control. *Lines v. Lines*, 142 Pa. 149, 21 Atl. 809 (1891).

19. *Inda v. Inda*, 288 N. Y. 315, 43 N. E. (2d) 59 (1942), *aff'g*, 263 App. Div. 925, 32 N. Y. S. (2d) 1008 (4th Dep't 1942), *aff'g without opinion*, 32 N. Y. S. (2d) 1001 (Sup. Ct. 1941).

20. 288 N. Y. at 318, 43 N. E. (2d) at 61.

21. N. Y. Laws 1914, c. 369, § 249(3). Similar statutes have been adopted in California, Michigan, Missouri, and Washington. See (1941) 26 WASH. UNIV. L. Q. 286; (1941) 16 WASH. L. REV. 106; (1938) 13 WASH. L. REV. 230; (1926) 54 WASH. L. REV. 745.

22. 288 N. Y. at 318, 43 N. E. (2d) at 61.

23. See *Moskowitz v. Marrow*, 251 N. Y. 380, 400, 167 N. E. 506, 512 (1929); *Marrow v. Moskowitz*, 255 N. Y. 219, 222, 174 N. E. 460 (1931).

of the parties a presumption of a joint tenancy, rebuttable by proof of a contrary intent, and that on the death of either of the parties this presumption becomes conclusive as to any money remaining in the account. But there would seem to have been no necessity for extending this statement to the principal case. The statute does not say that on the death of either party a conclusive presumption arises that a joint tenancy existed during their joint lives as to any monies left in the account. It says that, after the death of either, the making of the deposit in the prescribed form "shall . . . be conclusive evidence . . . of the intention of both depositors to vest title to such deposit . . . in [the] survivor."²⁴ As has been seen, the intention of the decedent in making an inter vivos transfer is immaterial. The only relevant question therefore is whether in fact he divested himself of ownership; and there is nothing in the statute to prevent a showing that he did not. If, on the other hand, some lack of intention to surrender full ownership is deemed essential for an illusory transfer, the statute could be said to establish an intention to vest title at the time of death rather than at the time of the making of the deposit. Similarly, if the statute creates a conclusive presumption of a joint tenancy, it could be said to vest title conclusively in the survivor at death and not at the time of the deposit.²⁵ In either case the illusory character of the transfer would depend on the respective rights of the depositors during the life of the decedent, and these rights could be shown under either of these interpretations of the Banking Law.²⁶

Moreover, even though a joint tenancy existed either in fact or by conclusive presumption, the court could have declared the transfer illusory with respect to half the deposit by following the *Newman* and *Krause* cases. Under a joint account each person receives a half of the income and can withdraw a half of the deposits.²⁷ Consequently, one who sets up a joint account with his

24. N. Y. Laws 1914, c. 369, § 249(3) (emphasis added).

25. For the argument see *Matter of Reed*, 89 Misc. 632, 154 N. Y. Supp. 247 (Surr. Ct. 1915). The legislature has recognized that title to the funds not deposited by the survivor does not vest in him until the death of the other tenant. See N. Y. Laws 1929, c. 383, § 220(5); *Moskowitz v. Marrow*, 251 N. Y. 380, 393, 167 N. E. 506, 510 (1929). But see *In re Darashinsky's Estate*, 145 Misc. 426, 260 N. Y. Supp. 289 (Surr. Ct. 1932); Note (1930) 66 A. L. R. 881.

26. Such an interpretation would not lessen the protection afforded savings banks by section 249(3) of the Banking Law, since notice to the bank of any adverse claim is not effective unless a court order is obtained or a suitable bond given. Moreover, interpleader of all adverse claims is provided in an action brought to recover the deposit. See N. Y. Laws 1914, c. 369, § 250(1) and (2). For a discussion of the New York law on joint bank accounts, see *Havens v. Havens*, 126 Misc. 155, 213 N. Y. Supp. 230 (Sup. Ct. 1925); (1932) 3 FID. L. CHRON. 22; (1926) 11 CORN. L. Q. 525; (1923) 9 CONN. L. Q. 48. For a consideration of joint bank accounts in general, see (1937) 32 ILL. L. REV. 57; (1933) 81 UNIV. OF PA. L. REV. 743; (1930) 19 GEO. L. J. 100. For a discussion of the theories on which they are based, see (1941) 16 WASH. L. REV. 106. And for the history of the device, see Katzenstein, *Joint Savings Bank Accounts in Maryland* (1939) 3 MD. L. REV. 109.

27. *O'Connor v. Dunnigan*, 158 App. Div. 334, 143 N. Y. Supp. 373 (3d Dep't 1913), *aff'd*, 213 N. Y. 676, 107 N. E. 1082 (1914); *In re Hoffman's Estate*, 175 Misc. 607, 25 N. Y. S. (2d) 339 (Surr. Ct. 1940); *In re Sutter's Estate*, 138 Misc. 85, 245 N. Y. Supp.

own funds retains as to one-half of the property control, income, and power to revoke the transfer. And in the *Newman* and *Krause* cases retention of these incidents of ownership was held sufficient to render a transfer illusory.²⁸

If the court had not declared the transfer real in the instant case it would have been faced with the problem of deciding whether a transfer can be set aside as illusory in favor of a surviving spouse when the decedent has died intestate.²⁹ The expressly declared purpose of the Decedent Estate Law is "to increase the share of a surviving spouse . . . either in a case of intestacy or by an election against the terms of a will. . . ." ³⁰ When a married person dies leaving a will, section 18 of the statute permits the surviving spouse to elect against the will unless it makes certain minimum provision for him. It does not permit the spouse to challenge any illusory transfers. Such transfers have been set aside by the courts not because of section 18, but because the purpose of the statute would otherwise have been vitiated.³¹ But the

636 (Surr. Ct. 1930). See *Bowditch v. Michigan Trust Co.*, 221 Mich. 247, 190 N. W. 699 (1922); *Murphy v. Michigan Trust Co.*, 221 Mich. 243, 190 N. W. 698 (1922). See also SCHOULER, *PERSONAL PROPERTY* (5th ed. 1918) 224; (1942) 8 *UNIV. OF PITTS. L. REV.* 130.

28. The court in the principal case emphasized that section 249(3) of the Banking Law makes joint bank accounts "a lawful and convenient method for the transmission of property." 288 N. Y. at 317, 43 N. E. (2d) at 60. This fact should not, however, deter the courts from setting them aside as illusory transfers in order to protect the surviving spouse. Like the trusts in the *Newman* and *Krause* cases they may be valid for all other purposes and yet invalid for this one. See *Newman v. Dore*, 275 N. Y. 371, 380, 9 N. E. (2d) 966, 969 (1937).

29. Consideration of this issue was deemed unnecessary. 288 N. Y. at 318, 43 N. E. (2d) at 61. Moreover, the discussion of this question which has appeared in the cases is extremely inadequate. See *Schnakenberg v. Schnakenberg*, 262 App. Div. 234, 28 N. Y. S. (2d) 841 (2d Dep't 1941); *Murray v. Brooklyn Savings Bank*, 258 App. Div. 132, 15 N. Y. S. (2d) 915 (1st Dep't 1939); *Clavin v. Clavin*, 41 N. Y. S. (2d) 377 (Sup. Ct. 1943). The court in the instant case might have been forced to render a decision on this question if an appeal had been taken from the judgment of the trial court as to a third account set up by Inda in a commercial bank, to which section 249(3) of the Banking Law does not apply. As to that account, it could have been shown, under the court's interpretation of the Banking Law, that no joint tenancy existed and that the decedent never divested himself of the ownership of the funds. The trial court set aside the account as an illusory transfer in derogation of the widow's rights. The absence of a will seems to have been considered immaterial, since no mention was made of it. See *Inda v. Inda*, 32 N. Y. S. (2d) 1001 (Sup. Ct. 1941).

30. N. Y. Laws 1929, c. 229, § 20.

31. The decisions in the *Newman* and *Krause* cases were frankly based on the policy of the statute. Although there was a will in the *Newman* case, the widow had no right of election under section 18, for the will made sufficient provision for her. See N. Y. Laws 1929, c. 229, § 18(b). The testator, however, transferred all his property before death and left none for distribution under the will. In order to effectuate the policy of the statute the court set aside the transfer as illusory and restored the property to the decedent's estate from whence it went to the widow by the terms of the will.

In the *Krause* case, the will left all the decedent's property to his three children and completely disinherited his wife. Although it does not appear from the facts, the property transferred by means of a Totten Trust was evidently not included in the will. For if

policy of the statute is neither embodied in nor limited to those sections dealing with wills.³² If, therefore, the courts are justified in relying upon the policy of the statute to protect a surviving spouse when there is a will, they are equally justified in so doing when the decedent has died intestate.³³

The decision in the present case raises some doubt as to whether the *Newman-Krause* test of an illusory transfer will be followed. It leaves undecided the problem of whether illusory transfers will be invalidated in favor of the surviving spouse when the decedent has died intestate. Yet it does provide a definite method by which one spouse can wholly disinherit the other without divesting himself of the ownership of his property during his lifetime—a result which, from the standpoint of the legislature's intent, is unfortunate.

It had been, the court need not have called the trust illusory, since the will would have automatically revoked the Totten Trust and the widow would then have taken by election against the will. See *In re Mannix's Estate*, 147 Misc. 479, 264 N. Y. Supp. 24 (Surr. Ct. 1933); *Matter of Murray*, 143 Misc. 499, 256 N. Y. Supp. 815 (Surr. Ct. 1932). The court could have permitted the widow to have elected against the will and taken her share from the other legacies. See *Matter of Byrnes*, 260 N. Y. 465, 184 N. E. 56 (1933). But it would seem that there was not enough property for distribution under the will to make this remedy of any avail. The court, therefore, applied the policy of the statute and set aside the Totten Trust as an illusory transfer. The property then became a part of the decedent's estate subject to distribution among the three children by the terms of the will. And the widow could elect against the will and take her share as in intestacy from the children's legacies.

Another theory on which illusory transfers could be set aside is that they are enough like testamentary dispositions to warrant the application of the statutory rules governing testamentary transactions. It would be difficult, however, to elect against a trust or joint bank account as if it were a will because the statute provides that election must take place within six months after the issuance of letters testamentary or letters of administration with the will annexed. See N. Y. Laws 1929, c. 229, § 18(7). This theory has not been accepted by the courts. See *Matter of Schurer*, 157 Misc. 573, 284 N. Y. Supp. 28 (Surr. Ct. 1935).

32. The purpose of the legislature to protect the surviving spouse is stated in N. Y. Laws 1929, c. 229, § 20 and specifically declared to apply both to section 18 and to section 83, which defines the intestate share of the surviving spouse and other intestate distributees.

33. It may be noted that in some cases the surviving spouse's intestate share may exceed the share he would have taken if the decedent had left a will and he had elected to take against it. See N. Y. Laws 1929, c. 229, §§ 18(a), 83. This fact, however, constitutes no reason for setting aside an illusory transfer only when the decedent has died testate. Section 18 defines the minimum share which the surviving spouse can take when the decedent has died testate. Section 83 defines the share which the surviving spouse shall take when the decedent has died intestate. N. Y. Laws 1929, c. 229, § 20 declares that the legislature's intention in granting each of these shares was to enlarge the property rights of the surviving spouse. If, following that intention, the courts protect one of the shares granted by the legislature against illusory transfers, they should also protect the other.

TAXATION OF TRUSTS DISCHARGING THE PARENTAL OBLIGATION TO SUPPORT*

ALTHOUGH the ability-to-pay principle is one of the few basic tenets of American taxation which is rarely if ever openly challenged,¹ taxpayers are apparently untiring in their efforts to evade the statutory expression of that principle embodied in the imposition of progressive surtaxes. The reallocation of taxable income within the family group, particularly by means of the family trust,² is one channel along which much of this attempted tax avoidance has been directed. In recent years, however, the courts have become increasingly sensitive³ to the demands of the federal treasury and to the antisocial implications⁴ of tax discrimination and avoidance, and have shorn the family trust of much of its former effectiveness.⁵

The United States Supreme Court has recently furthered this trend in *Helvering v. Stuart*⁶ by materially extending the doctrine of *Douglas v. Willcuts*⁷ that income used to meet the taxpayer's parental obligation to support is taxable to him and by possibly increasing the indicia of control which will justify imposition of tax under the *Clifford* doctrine.⁸ In March, 1930, John

* *Helvering v. Stuart*, 317 U. S. 154 (1942).

1. But see Field, *Should the Ability-to-Pay Principle be Recexamined?* (1942) 20 TAXES 664. The author concludes: "Is not the ability to pay principle turning out to be a collectivist Trojan horse?"

2. Another device of increasing importance is the family partnership. See *Humphreys v. Commissioner*, 88 F. (2d) 430 (C. C. A. 2d, 1937); *Commissioner v. Olds*, 60 F. (2d) 252 (C. C. A. 6th, 1932); R. C. Bennett, 1941-42 P. H. BTA Mem. Dec. ¶ 41,408. From the standpoint of efficient surtax evasion, however, private legal devices such as the family trust and the family partnership can not begin to compete with state community property laws. See *Poe v. Seaborn*, 282 U. S. 101 (1930); Oliver, *Community Property and the Taxation of Family Income* (1942) 20 TEX. L. REV. 532; Ray, *Proposed Changes in Federal Taxation of Community Property* (1942) 30 CALIF. L. REV. 397, 527. The adoption of compulsory joint returns would close these and other related loopholes. See *Hearings Before Committee on Ways and Means on H. R. 7378*, 77th Cong., 2d Sess. (1942) 9-10; Comment (1943) 52 YALE L. J. 355, 394 *et seq.*

3. See *Reinecke v. Smith*, 289 U. S. 172 (1933) ("A contrary decision would make evasion of the statute a simple matter."); *Burnet v. Wells*, 289 U. S. 670 (1933). But see *Kent v. Rothensies*, 35 F. Supp. 291 (E. D. Pa., 1940), *rev'd*, 120 F. (2d) 476 (C. C. A. 3d, 1941) ("This, however, is no warrant for this court to take over the task of catching up with the taxpayer.").

4. See Holmes, J., dissenting in *Campana de Tabocas v. Collector*, 275 U. S. 87, 100 (1927) ("Taxes are what we pay for civilized society.").

5. A few of the more famous victories in this campaign are *Helvering v. Clifford*, 309 U. S. 331 (1940) (irrevocable trusts); *Burnet v. Wells*, 289 U. S. 670 (1933) (income from irrevocable trusts used to discharge "a pressing social duty" of the settlor); *Corliss v. Bowers*, 281 U. S. 376 (1930) (revocable trusts); *Lucas v. Earl*, 281 U. S. 111 (1930) (assignment of income). The outstanding defeat is represented by *Poe v. Seaborn*, 282 U. S. 101 (1930) (community property). See Rudick, *The Problem of Personal Income Tax Avoidance* (1940) 1 LAW & CONTEMP. PROB. 243.

6. 317 U. S. 154 (1942).

7. 296 U. S. 1 (1935).

8. *Helvering v. Clifford*, 309 U. S. 331 (1940).

Stuart created separate trusts for each of his three adult children, naming himself, his wife, and his brother, R. Douglas Stuart, as trustees. Two years later, R. Douglas Stuart set up separate trusts for each of his four minor children, also naming himself, his wife, and his brother as trustees. Under the provisions of the R. Douglas Stuart trust indentures, each beneficiary was to receive one-half of the principal on reaching the age of thirty (twenty-five in the case of the son) and the remainder five years later. Prior to the termination of the trusts the trustees were to pay over to the beneficiaries as much of the annual income as the trustees should deem advisable. The John Stuart trustees were vested with similar discretionary powers which were to terminate at the end of fifteen years, and thereafter the trustees were to pay the entire net income from each trust to the beneficiary for life. The corpus of both the John Stuart and R. Douglas Stuart trusts consisted of shares of the common stock of the Quaker Oats Company, of which John and R. Douglas Stuart were president and first vice-president respectively. In both the John and R. Douglas Stuart trust indentures the respective wife and brother were specifically empowered, inter alia, "to alter, change, or amend this Indenture at any time and from time to time by changing the beneficiary hereunder . . . or in any other respect." In August, 1935, an amendment was executed to each of the trust indentures canceling these powers and substituting the statement that "this Indenture and all of the provisions thereof are irrevocable and not subject to alteration, change, or amendment."⁹

The Commissioner, relying on sections 166 and 167 of the Internal Revenue Code, which tax the settlor where either the trust corpus or income may be revested in him at "the discretion of any person not having a substantial adverse interest," and on section 22(a), taxing "income derived from any source whatever," sought to tax the net income of each of the John and R. Douglas Stuart trusts for 1934 and for the period in 1935 prior to the cancellation of the trustees' powers to amend. In the case of the R. Douglas Stuart trusts, the Commissioner also asserted that the obligation to support the settlor's minor children during the taxable years in question and the discretionary power of the trustees, which might discharge this obligation, to distribute the net income to each child-beneficiary, brought the income from those trusts within the *Douglas v. Willcuts* doctrine.

The Board of Tax Appeals sustained the Commissioner as against both settlor-taxpayers, holding that under Illinois law the trustees would not be acting outside of the powers granted them in the trust indentures if they re-vested corpus or income in the grantors and that therefore the settlors were liable for tax under sections 166 and 167.¹⁰ No decision was made as to liability under section 22(a). The Circuit Court of Appeals for the Seventh Circuit reversed the Board's findings as to Illinois law and held both the settlor-taxpayers not taxable under any of the sections invoked by the Commissioner.¹¹ Similarly, the court refused to apply the doctrine of *Douglas v.*

9. No attempt was made to tax to the settlor trust income accruing subsequently to this amendment.

10. 42 B. T. A. 1421 (1940).

11. 124 F. (2d) 772 (C. C. A. 7th, 1941).

Willcuts to funds which although available for the support of the grantor's minor children were not actually used for that purpose.¹² The Supreme Court accepted the circuit court's conclusions as to sections 166 and 167,¹³ but remanded the John Stuart case to the Tax Court for a finding as to whether or not the settlor had retained such attributes of ownership as would bring him within the *Clifford* interpretation of section 22(a).¹⁴ R. Douglas Stuart, however, was held taxable on the entire net income of all the trusts of which he was the settlor on the ground that mere availability, as opposed to actual use, of the entire income of the trusts for the support of the settlor's minor children was sufficient to bring this income within *Douglas v. Willcuts*.¹⁵ In thus extending *Douglas v. Willcuts* to the factual situation presented by the R. Douglas Stuart trusts, the Supreme Court has taken a position contrary to that previously adopted by the Treasury Department¹⁶ and one which the lower courts,¹⁷ and at least one commentator,¹⁸ had once thought untenable. But since the statute states that the grantor is liable for tax "where any part of the income of a trust may . . . be distributed" to the grantor,¹⁹ and since *Douglas v. Willcuts* declared that trust income used to relieve a grantor's legal

12. *Id.* at 780.

13. 317 U. S. 154, 163 (1942).

14. *Id.* at 169.

15. *Id.* at 171.

16. G. C. M. 18972, 1937-2 Cum. Bull. 231, 233. "This office has reached the conclusion that in cases where the trust income, or at least part of it, might, in the discretion of the trustees, have been used to support the minor children of the grantor there should be taxed to the grantor only so much of the trust income as is actually distributed for the support and maintenance of the beneficiaries whom the grantor is legally obligated to support." But see U. S. Treas. Reg. 86, art. 167-1(b). "The income so inures if it is or may be applied in satisfaction of a legal obligation of the grantor. . . ." (Italics supplied).

17. *Hudson v. Jones*, 22 F. Supp. 938 (W. D. Okla., 1938); *Deuble v. Commissioner*, 42 B. T. A. 277 (1940); *Chandler v. Commissioner*, 41 B. T. A. 165 (1940); *Berolzheimer v. Commissioner*, 40 B. T. A. 645 (1939), *rev'd on other grounds*, 116 F. (2d) 628 (C. C. A. 2d, 1940); *Tiernan v. Commissioner*, 37 B. T. A. 1048 (1938); *Black v. Commissioner*, 36 B. T. A. 346 (1937). *Contra*: *Whiteley v. Commissioner*, 120 F. (2d) 782 (C. C. A. 3d, 1941); *Pyeatt v. Commissioner*, 39 B. T. A. 774 (1939). In the *Pyeatt* case the discretion to disburse trust income for the support of the grantor's surviving child was vested in the grantor, rather than the trustee, and thus was distinguishable from the *Stuart* case on its facts. In the *Whiteley* case the court discussed but made no decision as to the possibility of correlating section 167 and *Douglas v. Willcuts*. The court relied instead on *Helvering v. Horst*, 311 U. S. 112 (1940), and "the non-material satisfaction" which the accumulation of trust income for the benefit of the settlor's son gave the settlor. The Supreme Court in the *Stuart* case, however, stated that the mere fact that this "would satisfy the normal desires of a parent to make gifts to his children" was not "sufficient to make the income of the trust taxable to the settlors." 317 U. S. 154, 168. The Supreme Court also cited the *Horst* case for the proposition that "the 'non-material satisfactions' (gifts-contributions) of a donor are not taxable as income." *Ibid.*

18. See Paul, *Five Years With Douglas v. Willcuts* (1939) 53 HARV. L. REV. 1, 7, n. 18. See also MAGILL, *TAXABLE INCOME* (1936) 245, 246.

19. INT. REV. CODE § 167 (1939). (Italics supplied).

obligation is income distributed to the grantor,²⁰ it would seem that on this point the *Stuart* decision merely represents a logical correlation of section 167 with the doctrine of constructive receipt.²¹

The logical impregnability of the *Stuart* extension will not, however, preclude taxpayers' attacking it, and it is more than probable that an effort will be made to induce the courts to limit the *Stuart* extension to such income as would reasonably be required, though not actually used, to meet the parental obligation of support.²² The argument might be made that the *Stuart* rationale can hardly require that a settlor be liable for tax, for example, on the entire income of a million-dollar trust for the benefit of a two-year-old infant.²³ Nevertheless, the Supreme Court did hold the entire net income from all four of the R. Douglas Stuart trusts for the year 1934, each of which amounted to over \$9,000, taxable to the settlor, although the beneficiaries were eighteen, fourteen, twelve, and six years old. Moreover, if the courts attempted to set arithmetical limits to the parental obligation and if they adhered to the accepted proposition that the parental obligation varies with the parent's wealth, station in life, and age of the children,²⁴ they would open the door to interminable litigation.

20. See Paul, *supra* note 18.

21. The limits to this correlation are not easily defined. The fact that *Douglas v. Willcuts* was not applied in the case of the John Stuart trusts suggests that trust income available for the support of children over 21 years of age will not be income to the parent-settlor. See 317 U. S. at 168. It is also probable that the income from a trust set up by a third person for the support of a minor child will not be taxable to the parent on the theory that such income is a gratuitous discharge of the latter's parental obligation. See Paul, *supra* note 18, at 31. But it might be argued that such a transfer is a gift to the father, not of the capital fund itself, but of annually recurring income paid to the beneficiary in discharge of the father's obligation and that, therefore, the father is taxable under *Irwin v. Gavit*, 288 U. S. 161 (1925). See Note (1935) 48 HARV. L. REV. 815, 818.

The Supreme Court was careful to point out that it was "not here appraising the application of § 167 to cases where a wife is the trustee or beneficiary of the funds which may be used for the family benefit." 317 U. S. at 170. A subsequent decision of the Tax Court has held the *Stuart* extension not applicable to that situation. *Walter L. and V. C. Ferris*, 1 T. C. 992 (1943).

22. There is precedent for distinguishing between trust income used to pay for a minor beneficiary's necessities and that used for his luxuries. See *Ryburn G. Clay*, 36 B. T. A. 1326 (1937).

23. This is Mr. Paul's example of *Douglas v. Willcuts* reductio ad absurdum. "Yet surely there must be some limit to the principle of the *Douglas* case in this connection; if we may imagine a million-dollar trust for the benefit of a two-year-old child, it would be wholly arbitrary and fancible to hold the entire income taxable to the father on the theory of support." See Paul, *supra* note 18, at 30.

24. In *Cromwell v. Converse*, 108 Conn. 412, 426, 143 A. 416, 421 (1928), the court said "Maintenance and support . . . are not words of art, but have a relative meaning The testator possessed large means; his children had been reared in luxurious living and were accustomed to its uses. What was suitable for his son's situation and station in life is that which those possessed of great wealth and social position customarily adopt for their scale of living in these modern times." See also *Park Utah Consol. Mines v. Industrial Commissioner*, 84 Utah 481, 36 P. (2d) 979 (1934); *Lake v. Bender*, 18 Nev. 361, 7 Pac. 74 (1885).

In addition to the difficulties which may arise from any attempt to set arithmetical limits upon the parental obligation of support, the *Stuart* extension of *Douglas v. Willcuts* confronts the Treasury Department with several administrative problems. These problems are largely the result of a General Counsel's Memorandum, issued by the Treasury Department in 1937, stating that settlors were taxable on only so much of the trust income as was actually used to relieve the settlor of his parental obligation of support.²⁵ Taxpayers who, after 1937, set up trusts similar to those involved in the R. Douglas Stuart case may argue that they acted in reliance upon the Treasury Department's G.C.M. and to tax them now would be grossly inequitable.²⁶ Specifically, the problem is whether or not the Treasury Department, within the confines of a right to tax retroactively for three years,²⁷ should attempt to tax (1) the income accruing *prior* to the *Stuart* decision from trusts created *before* the issuance of the G.C.M., (2) the income accruing *prior* to the *Stuart* decision from trusts created *after* the issuance of the G.C.M., (3) the income accruing *subsequent* to the *Stuart* decision from trusts created *before* the issuance of the G.C.M., (4) and the income accruing *subsequent* to the *Stuart*

25. See G.C.M. 18972, *supra* note 16.

26. The underlying equities are those created whenever a decision overruling a previous precedent upon which individuals have relied in acquiring property interests is given retroactive effect in accordance with the declaratory theory of *stare decisis*. See 1 MOORE'S FEDERAL PRACTICE (Supp. 1942) 99; Kocourek, *Retrospective Decisions and Stare Decisis and A Proposal* (1931) 17 A. B. A. J. 180. The Federal Constitution neither precludes nor compels the retroactive application of an overruling case. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932). Compare the retroactive effect which a New York court in *People ex rel. Rice v. Graves*, 242 App. Div. 128, 273 N. Y. Supp. 582 (3d Dep't 1934) gave to the Supreme Court's overruling of *Long v. Rockwood*, 277 U. S. 142 (1928) (state cannot tax income from copyrights) in *Fox Film Corp v. Doyal*, 286 U. S. 123 (1932) (state can tax income from copyrights), with the prospective effect which the Montana court gave to an overruling decision in *Sunburst Oil & Refining Co. v. Great Northern Ry.*, 91 Mont. 216, 7 P. (2d) 927 (1932). ARNOLD AND JAMES, *CASES ON TRIALS, JUDGMENTS AND APPEALS* (1930) 209, n. 41 characterizes the Montana decision as "probably both unique and eminently sensible."

That a particular decision would cause hardship if retroactive is apparently a good reason in the opinion of the Supreme Court for not making it. In *Helvering v. Griffiths*, 63 Sup. Ct. 636, 653 (U. S. 1943), Mr. Justice Jackson said: "To rip out of the past seven years of tax administration a principle of law on which both Government and taxpayers have acted would produce readjustments and litigation so extensive we would contemplate them with anxiety. We have recently held as to another questioned decision of this Court that a long period of accommodations to an older decision sometimes requires us to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change." The solution to the problem which is suggested by Mr. Justice Douglas in his dissent in the *Griffiths* case is that "inequities may result from a holding in 1943 that *Eisner v. Macomber* has not been law since 1936. But the relief against them lies with Congress. Our task ends if we erase *Eisner v. Macomber* and give Congress a clean slate on which to write." *Id.* at 655. Relief may also be given by the administrative agency concerned. See note 29 *infra*.

27. Section 275(a) of the Internal Revenue Code limits the Treasury's right to collect taxes to income not previously assessed within the past three years.

decision from trusts created *after* the issuance of the G.C.M. Although the Treasury Department is not legally estopped from seeking to tax those claiming reliance upon a G.C.M.,²⁸ forbearance to tax income on such trusts which accrued prior to the *Stuart* case would seem to be appropriate to avoid the financial hardship which would be imposed on individuals who might now be without means to meet a tax which they had been led to believe would not be levied.²⁹ Similar equities arising out of the failure to provide for future tax liability in reliance upon the 1937 G.C.M. can be marshalled to excuse tax liability on income accrued prior to the *Stuart* case from trusts created even before the G.C.M. No such argument can be advanced, however, to excuse liability on income accruing after the *Stuart* decision from trusts established either before or after the issuance of the G.C.M., although some relief will probably be sought in the case of the latter on the ground that the trusts were presumably set up in reliance upon the G.C.M. But such a memorandum should not operate as a bar to the collection of taxes which the Court has declared to be properly levied. The evasion of surtaxes should not be a game in which the taxpayer can never lose. However, much continuing hardship would be avoided if it were to become judicially established under local law that a court of equity will, if applied to by the grantor, expunge those clauses which authorize the use of trust income to discharge the parental obligation of support and thus remove the possibility of his being taxed on future trust income.³⁰ Although the general doctrine is that "if the settlor does not by the

28. On the title page of every Internal Revenue Bulletin the following statement is printed: "The rulings reported in the Internal Revenue Bulletin are for the information of taxpayers and their counsel as showing the trend of official opinion in the administration of the Bureau of Internal Revenue; the rulings other than Treasury Decisions have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury."

29. The appropriate administrative relief would be similar to that given by the Treasury Department when confronted by the *Hallock* decision. In *Helvering v. Hallock*, 309 U. S. 106 (1940), which involved the applicability of the estate tax to trusts of which the settlor reserved a reversionary interest terminable at the settlor's death, the Supreme Court specifically overruled *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48 (1935) and *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39 (1935), which held that the settlor was not taxable, and reinstated the earlier *Klein v. United States*, 283 U. S. 231 (1941), which held the settlor was taxable. The Treasury Department then announced that it would not tax settlors of trusts created in reliance on the *St. Louis Trust* decisions. U. S. Treas. Reg. 105, §81.17. It is true, of course, that the *Hallock* decision pertains to the taxation of the transfer of trust property, while the *Stuart* extension is concerned with the taxation of annually recurring trust income, but the equitable considerations underlying the appropriateness of administrative relief are the same in both situations. See note 26 *supra*. An example of legislative relief under similar circumstances is the recent Congressional amendment to the gift tax law which permits gift-tax-free releases of existing powers of appointment in order that donees of the power may avoid the broadened incidence of the estate tax imposed on the transfer by death of property via powers of appointment. See Eisenstein, *Powers of Appointment and Estate Taxes: II* (1943) 52 YALE L. J. 494, 545 *et seq.*

30. A settlor would be, of course, even more effectively insulated against future tax liability if an amendment to the trust indenture were executed which specifically stated

terms of the trust reserve a power to alter or amend or modify it, he has no power to do so,"³¹ a court of equity might find within its prerogatives the power and willingness to amend the trust, especially if the amendment requested would increase, or at least not impair, the equitable interest of the beneficiaries. The conceptual difficulties which might be presented by local law adverse to such alteration would be minimized if the beneficiary and the trustee were to join the grantor in applying for this type of amendment.³²

In addition to correlating section 167 with *Douglas v. Willcuts*, and thus further disabling the family trust device, the Supreme Court in the *Stuart* decision also opened the way for a substantial extension of the *Clifford* doctrine.³³ After accepting the circuit court's determination that under Illinois law the settlor had no power to revoke and hence was not liable under sections 166 and 167, the Supreme Court remanded the John Stuart case to the Tax Court for a finding as to liability under section 22(a).³⁴ The factors recommended for the Tax Court's consideration materially enlarge the circumstances under which some courts³⁵ had previously thought the *Clifford* doctrine to be applicable. Mr. Justice Reed mentioned specifically as factors to be considered the possibility that "control of the stocks of the company of which the grantors were executives may have determined the manner of creating the trusts," the fact that "paragraph eight [of the trust indenture] permits recapture of the stocks from the trust by payment of their value," and "the family relationship [which] evidently played a part in the selection of the trustees."³⁶ In effect, the Supreme Court asked the Tax Court to determine whether or not the settlor "has rather complete assurance that the trust will not effect any substantial change in his economic position"³⁷ because of the nature of the corpus, the right to recapture, the identity of the trustees, and the control which the existence of reciprocal trusts gives each grantor over the trustees of his trust.

that no part of the trust income was to be used for the education, maintenance, or support of the settlor's minor children.

31. 3 SCOTT, TRUSTS (1939) § 331. But see *Curtis v. Brown*, 29 Ill. 201, 230 (1862); 2 SCOTT, TRUSTS (1939) § 167.

32. See 3 SCOTT, TRUSTS (1939) § 337.

33. For a comprehensive analysis of the *Clifford* doctrine, see Pavenstedt, *The Broadened Scope of Section 22(a): The Evolution of the Clifford Doctrine* (1941) 51 YALE L. J. 213.

34. 317 U. S. 154, 169 (1942).

35. The Circuit Court of Appeals, Seventh Circuit, said in holding the *Clifford* doctrine not applicable to the *Stuart* trusts: "We think the ruling in the *Clifford* case did not go so far as to hold that mere family solidarity gave the federal courts the right to ignore the State jurisdiction to determine the rights of beneficiaries under a trust, and the extent of the trustees' discretion. The elements required to bring a taxpayer within the scope of that case are quite clearly noticed in *Helvering v. Elias*, 2 Cir., 122 F. (2d) 171. They are (a) close family relationship, (b) short term trust, and (c) reservation of powers of management. See also *Commissioners v. Barbour*, 2 Cir., 122 F. (2d) 165. *Certiorari* was denied in both of these cases, 62 S. Ct. 361. In the present case we have no short terms, nor power of management in the grantor." 124 F. (2d) at 778.

36. 317 U. S. 154, 169 (1942).

37. *Helvering v. Clifford*, 309 U. S. 331, 335 (1940).

The *Stuart* case reaffirms the Court's earlier position that the *Clifford* doctrine calls for a realistic appraisal of "all the circumstances attendant on [the] operation and creation"³⁸ of the particular trust in question. On the facts presented, a holding by the Tax Court to the effect that the degree of the settlor's actual, as opposed to formal, control was such as would bring the trust within the *Clifford* doctrine could hardly be considered unreasonable, and such a holding is indicated in the tenor of the Supreme Court's recommendation.

In remanding the John Stuart case to the Tax Court because "*the triers of fact* [had] made no finding on this point,"³⁹ the Supreme Court has apparently modified its earlier disposition to regard liability under the *Clifford* doctrine more as an issue of law than of fact.⁴⁰ The restriction thus imposed on the Court's willingness to review is an outgrowth of the present Court's tendency, when faced with an administrative determination, to decide whether a particular issue is one of law or fact on the basis of relative expertness.⁴¹ If the Court believes that the issue is one peculiarly within its special competence, or if the issue is one upon which it is particularly anxious to speak,⁴² then the issue is one of law; if not, then it is one of fact.⁴³ As a result of characterizing liability under the *Clifford* doctrine as an issue of fact, in future cases the Tax Court will probably make a "finding of fact" as to the taxpayer's liability under each of the theories on which the Treasury is proceeding. And the number of Tax Court decisions from which an appeal will be taken or certiorari granted will probably diminish, since "findings of fact" are not reversible on appeal except on a showing of unreasonableness.⁴⁴

38. *Ibid.* (Emphasis supplied).

39. 317 U. S. 154, 169 (1942) (Emphasis supplied).

40. In the *Clifford* case itself, Mr. Justice Douglas said: "In this case we cannot conclude as a matter of law that respondent ceased to be the owner of the corpus after the trust was created." (Emphasis supplied). 309 U. S. at 335. See also *Hormel v. Helvering*, 312 U. S. 552 (1941).

41. See the concurring opinion of Mr. Justice Frankfurter in *Driscoll v. Edison Light & Power Co.*, 307 U. S. 104, 122 (1939); concurring opinion of Justices Black, Douglas, and Murphy in *FPC v. Natural Gas Pipe Line Co.*, 315 U. S. 575, 599 (1942); *Gray v. Powell*, 314 U. S. 402 (1941); LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) c. IV; Brown, *Fact and Law in Judicial Review* (1943) 56 HARV. L. REV. 899; Hamilton and Braden, *The Special Competence of the Supreme Court* (1941) 50 YALE L. J. 1319.

42. Individual Justices have not been consistent in their characterizations of administrative adjudications in the past. For example, contrast the stand of Mr. Justice Frankfurter in the *Driscoll* case, 307 U. S. 104, 122 (1941) (the determination of utility rates is not within the special competence of the Supreme Court), and his stand in *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177 (1941) (the ordering of back pay to employees who had willfully failed to work elsewhere is not within the special competence of the NLRB). Contrast also Mr. Justice Douglas's opinion in *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475 (1942), with his concurrence in Mr. Justice Murphy's dissent in *Phelps Dodge Corp. v. NLRB*, *supra*.

43. See Brown, *supra* note 41.

44. The judicial review which may result from this characterization may be similar to that outlined in *Gray v. Powell*, 314 U. S. 402, 411 (1941). Mr. Justice Reed, who wrote the majority opinion in the *Stuart* case, said: ". . . the function of review placed

In the *Stuart* case the Court also laid down another principle of review which has less fortunate implications, for the Court has apparently replaced the former presumption in favor of the Commissioner's determination of local law⁴⁵ with a similar presumption in favor of the circuit court.⁴⁶ The Commissioner's original argument had been that there was no express provision in the trust indentures to prevent the trustees, who were not persons with an interest substantially adverse to that of the settlor,⁴⁷ from revesting in the grantor title to the corpus or income of any of the trusts and that the possibility of their doing so was sufficient to bring the trusts within sections 166 and 167. The taxpayer had claimed that any equity court in Illinois, under whose laws the trusts had been created and were being administered, would, if appealed to, prohibit such a revesting. Although the Commissioner agreed that Illinois law controlled, he challenged the taxpayer's interpretation of that law. Thus the federal income tax liability of the grantors under sections 166 and 167 turned on the interpretation of state law.⁴⁸ Characterizing the power of the trustees as absolute⁴⁹ rather than fiduciary,⁵⁰ the Tax Court held that the trustees could revest title to the corpus in the grantor without interference by an Illinois court of equity.⁵¹ The circuit court of appeals, however, was "convinced that the wife and brother as trustees had no authority under the Illinois law to revest the property in the grantor" and reversed the Tax Court's holding on that point.⁵² The Supreme Court accepted the circuit court's determination without further inquiry, saying: "This conclusion does not spring from a statute of that state nor even from a clear and satisfying line of decisions. It is, however, the reasoned judgment of the circuit which includes Illinois in which a judge of long experience in the jurisprudence of that state participated. Without a definite conviction of error, this Court will not reverse that judgment."⁵³ The *Stuart* case, therefore, is apparently now authority for the proposition that the Supreme Court will not reverse a cir-

upon the courts by Section 6(b) [Bituminous Coal Act of 1937, 50 STAT. 72] is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of this statute in a just and reasoned manner." Taxpayers are not likely to go to the expense of securing such an appellate review.

45. See *Leser v. Burnet*, 46 F. (2d) 756 (C. C. A. 4th, 1931).

46. In the *Stuart* case the Tax Court and the Seventh Circuit Court of Appeals disagreed as to Illinois law. The Supreme Court upheld the circuit court's determination, even though "this conclusion [did] not spring from a statute of that state nor even from a clear or satisfying line of decisions." 317 U. S. at 163.

47. Compare *Altmaier v. Commissioner*, 116 F. (2d) 162 (C. C. A. 6th, 1940), *cert. denied*, 312 U. S. 706 (1941).

48. Federal tax incidence frequently depends on determinations of local law. See PAUL, *The Effect of Federal Taxation of Local Rules of Property* in SELECTED STUDIES IN FEDERAL TAXATION, SECOND SERIES (1938) 1.

49. See *Fulham v. Commissioner*, 110 F. (2d) 916 (C. C. A. 1st, 1940).

50. See *Higgins v. White*, 93 F. (2d) 357 (C. C. A. 1st, 1937).

51. 42 B. T. A. 1421 (1940).

52. 124 F. (2d) 722, 778 (C. C. A. 7th, 1941).

53. 317 U. S. 154, 163 (1942).

cuit court's determination of local law which is silent or confused except upon a showing of unreasonableness.

This new ⁵⁴ rule, which contradicts earlier decisions ⁵⁵ and seems to extend a principle of review built up under *Eric Railroad v. Tompkins*,⁵⁶ probably reflects the desire of the Court to give circuit court decisions a finality which will relieve the burden on the Supreme Court and leave the determinations of questions of local law in the hands of those thought specially qualified to handle them. But instead of lightening the burden on the Court, the rule is more likely to result in extended argument as to whether or not there is any rational basis for the circuit court's determination, and the time thus consumed will probably be no more than would be required to hear the local law question on its merits. Moreover, it would appear that this principle of review will necessarily confuse the ultimate determination of federal tax litigation and, in limiting the presumption formerly accorded the Commissioner's determination of local law, undermine efficient tax administration.

THE RIGHT TO INTERVENE AND APPEAL IN FEDERAL COMMUNICATIONS COMMISSION PROCEEDINGS*

SINCE the passage of the Communications Act of 1934,¹ a process of judicial interpretation has limited the right of third parties in interest to intervene before the Federal Communications Commission in hearings directed toward the granting, refusing, or modification of a radio broadcasting license and the complementary right to appeal from the decisions in such hearings. The problem of curtailing intervention and appeal is complicated by the fact that this Commission, unlike other administrative bodies, operates within the narrow confines of the wave lengths² and regulates interests which compete among themselves for the limited frequency space available.

54. The Court, however, attempted to distinguish the rule applied in the *Stuart* case and that applied in *Pearce v. Commissioner*, 315 U. S. 543 (1942); *Helvering v. Fuller*, 310 U. S. 69 (1940); *Helvering v. Leonard*, 310 U. S. 80 (1940); *Helvering v. Fitch*, 309 U. S. 149 (1940): In each of these cases the Supreme Court reviewed the merits of a circuit court's determination of local law.

55. See cases cited note 54 *supra*.

56. 304 U. S. 64 (1938). See *Palmer v. Hoffman*, 318 U. S. 109 (1943); *Eisenstein*, *supra* note 29, at 548, n. 262.

* *FCC v. NBC*, 63 Sup. Ct. 1035 (U. S. 1943), *aff'g*, *NBC v. FCC*, 132 F. (2d) 545 (App. D. C. 1942).

1. 48 STAT. 1064 *et seq.* (1934), 47 U. S. C. §§ 151 *et seq.* (1940).

2. See *NBC v. FCC*, 132 F. (2d) 545, 548 (App. D. C. 1942): "In the present stage of radio, very few changes, either in frequency or in power, can be made without creating some degree of electrical interference. This may range from minute and practically harmless interruption with remote and very occasional listeners in secondary service areas to total obliteration in the primary field."

The right of third parties to appeal has been controlled through a flexible application of the general statutory prerequisite of some "public interest, convenience, or necessity."³ In interpreting this requirement, the courts have set up and attempted to reconcile the two divergent propositions that "... private litigants have standing only as representatives of the public interest"⁴ and that appellants "to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."⁵ On the basis of these criteria, an appeal is permitted under section 402(b) of the Communications Act⁶ to persons aggrieved if they combine allegations of substantial financial injury with a claim that the public interest has been disregarded by the Commission. But a mere allegation of injury through increased competition is insufficient because the appellant, although apparently having suffered severe financial loss, does not speak as a representative of the public interest.⁷ The investment in radio equipment made in reliance on a license may in some instances be a ground for appeal because the licensee is protected by the Fifth Amendment from capricious and arbitrary action on the part of the Commission.⁸ Yet a

3. 48 STAT. 1085 (1934), 47 U. S. C. § 309(a) (1940). For a discussion of this statutory criterion, see Penstone, *Meaning of the Term "Public Interest, Convenience, or Necessity" under the Communications Act of 1934, as Applied to Applications for Licenses to Construct New Broadcasting Stations* (1941) 9 GEO. WASH. L. REV. 873. Mr. Penstone interprets the phrase in terms of four basic elements: public need; legal, technical and financial qualifications of the applicant; the absence of objectionable interference; merit and suitability of the applicant's proposed programs to the needs of the community.

4. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 125 (1940).

5. *Scripps-Howard v. FCC*, 316 U. S. 4, 14 (1942). See Warner, *Subjective Judicial Review of the Federal Communications Commission* (1940) 38 MICH. L. REV. 632, 665 *et seq.* for a criticism of this type of standard.

6. 48 STAT. 1093 (1934), 47 U. S. C. § 402(b) (1940) provides:

"An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"(1) By an applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

7. See *Yankee Network v. FCC*, 107 F. (2d) 212 (App. D. C. 1939) 217, n. 14: "It is . . . apparent that the granting of a license by the Commission creates a highly valuable property right, which, while limited in character, nevertheless provides the basis upon which large investments of capital are made . . ." See *Symons Broadcasting Co. v. FCC*, 64 F. (2d) 381, 382 (App. D. C. 1933); MORROW, *SOME CONSTITUTIONAL ASPECTS OF THE COMMUNICATIONS ACT OF 1934* (1938) 39-48; 1 SOLOW, *THE LAW OF RADIO BROADCASTING* (1939) 1000, n. 13; Davis, *The Requirement of Opportunity to be Heard in the Administrative Process* (1942) 51 YALE L. J. 1093, 1118 *et seq.* (a criticism of the view that licenses are "privileges" under the law rather than property rights and so can be revoked without hearing); (1940) 11 AIR L. REV. 177, 183.

8. See *WOKO v. FCC*, 109 F. (2d) 665 (App. D. C. 1939).

licensee generally has no vested property interest in his license⁹ and may not, simply on the basis of past operation of a broadcasting station, acquire any interest in the radio market and thereby protect himself from future competitors.¹⁰

Although there has been some confusion as to the right of appeal on the basis of electrical interference without financial injury, it would appear that the doctrines developed with regard to financial loss are equally applicable in this case.¹¹ Despite the fact that electrical interference is almost always accompanied by financial injury, it is probable that in the case of non-profit and clear-channel stations this financial loss would be too slight to be a sufficient basis for appeal, and the only possible remedy to the courts would be on a claim of substantial electrical interference. However, the unfortunate dictum in the *Sanders* case that Congress "may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license"¹² once

9. See *Scripps-Howard v. FCC*, 316 U. S. 4, 14 (1942), where Mr. Justice Frankfurter states: "The Communications Act of 1934 did not create new private rights." See *FCC v. Sanders Bros. Radio Station*, 309 U. S. 470, 475 (1940), holding that no one has "anything in the nature of a property right as a result of the granting of a license." Cf. *FRC v. Nelson Bros.*, 289 U. S. 266 (1933) (temporary licenses granted by the Federal Radio Commission may be summarily revoked).

10. In *FCC v. Sanders Bros. Radio Station*, 309 U. S. 470, 475 (1940) the Court stated: "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee *who was not interfering electrically* with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public." (Italics added). See also *Pulitzer Publishing Co. v. FCC*, 94 F. (2d) 249 (App. D. C. 1937). Cf. *Piedmont Light & Power Co. v. Town of Graham*, 253 U. S. 193, 195 (1920): "The grant . . . not being an exclusive one the contention that competition in business, likely to result from a similar grant to another company, would be . . . a taking of . . . property in violation of the Constitution is . . . plainly frivolous." See also the dissenting opinion of Judge Edgerton in *NBC v. FCC*, 132 F. (2d) 545, 575 (App. D. C. 1943).

11. *Ward v. FCC*, 108 F. (2d) 486, 487 (App. D. C. 1939) is specific: "The considerations upon which we held in the *Yankee Network* case, that injury to economic interests may be sufficient to bring a station licensee within the terms of Section 402(b) (2) as an aggrieved person, are equally applicable in the case of objectionable electrical interference." Similar holdings had been implied in *Symons Broadcasting Co. v. FRC*, 64 F. (2d) 381 (App. D. C. 1933) and in *Journal Co. v. FRC*, 48 F. (2d) 461 (App. D. C. 1931).

Nor has the FCC itself ignored electrical interference as a basis for refusing a license modification. See *Matter of North Carolina Broadcasting Co.*, 1 F.C.C. Rep. 232 (1935); *Matter of Peoria Broadcasting Co.*, 1 F.C.C. Rep. 167 (1935).

12. *FCC v. Sanders Bros. Radio Station*, 309 U. S. 470, 477 (1940), 11 *AIR L. REV.* 177. The effect of the dictum in the *Sanders* case was made especially strong in that the Supreme Court amended its opinion after handing it down by ordering the insertion of the word "financial." See 309 U. S. 642 (1940).

indicated that the United States Supreme Court might exclude those injured only electrically from judicial review of the Commission's determinations.

While there has been little explicit judicial discussion of the right to intervene, it would seem that in general third parties are permitted to intervene in Commission hearings where a substantive right of the would-be intervenor is in question. Because judicial review is limited to an examination of questions of law, the courts have often considered it an inadequate substitute for an administrative hearing.¹³ In *Chicago Federation of Labor v. FRC*,¹⁴ it was held that where new broadcasting station licenses were to be considered, existing licensees, if they were to be substantially affected, should be allowed to intervene in the proceedings. In *Saltzman v. Stromberg-Carlson Telephone Manufacturing Company*,¹⁵ the Commission was enjoined from issuing without notice or hearing to the applicant a renewal license for a frequency other than that for which the broadcasting station had originally applied. Although in this case there was no attempt to intervene by a third party, the situation is similar to that in which a third party who has made no request to the Commission finds his license indirectly modified by a Commission order. The rule of these cases was apparently extended in *Symons Broadcasting Company v. FRC*,¹⁶ where the Court of Appeals for the District of Columbia held it the duty of the Commission to grant either of two applicants for the same frequency a hearing if desired. A possible stringent limitation upon the freedom of intervention was indicated, however, in *Sykes v. Jenny Wren*.¹⁷ There a third party sought to intervene because the quality of service offered the public would be impaired and increased competition would result from a Commission authorization of longer hours of a competitor's operation, and it was held that

13. A debate has long raged whether the courts' power to review questions of law and also to remand a case to the Commission if there is no substantial evidence to support the Commission's decision is a sufficient substitute for an administrative hearing. The leading case supporting the contention that judicial review per se is an adequate protection is *Sykes v. Jenny Wren*, 78 F. (2d) 729 (App. D. C. 1935). The dissenting opinion of Judge Groner, however, was especially strong; and in *NBC v. FCC*, 132 F. (2d) 545 (App. D. C. 1942) it apparently became the view of the court. But cf. *Symons Broadcasting Co. v. FRC*, 64 F. (2d) 381 (App. D. C. 1933), where the court remanded the case because "there is nothing in the record . . . by which we are able to determine the rights of the parties on the merits"; *Red River Broadcasting Co. v. FCC*, 98 F. (2d) 282 (App. D. C. 1938), where an applicant was denied judicial relief because it had not yet exhausted the administrative remedies. See Davis, *supra* note 7, at 1139: "Even though due process may be satisfied by judicial review, it does not follow that judicial review is an adequate substitute for administrative hearings For protection of private parties, a regularized administrative procedure may afford far better safeguards than a theoretical right of review, which is so illusory."

14. 41 F. (2d) 422, 423 (App. D. C. 1930).

15. 46 F. (2d) 612 (App. D. C. 1931). Notice the restricted concept that ". . . a hearing implies that an opportunity will be given the applicant to appear and hear the evidence and examine and cross-examine the witnesses, to test, explain and refute any evidence introduced against him."

16. 64 F. (2d) 381, 382 (App. D. C. 1933).

17. 78 F. (2d) 729 (App. D. C. 1935). See note 13 *supra*.

the right of the aggrieved party to judicial review was a satisfactory substitute for intervention.

The rights of intervention and appeal have been substantially extended by a recent case.¹⁸ The Matheson Radio Company, operating Station WHDH at Boston, Massachusetts, applied for and received an order authorizing increased hours of operation and increased power. Station KOA of Denver, Colorado, claiming that this order effectively modified its own license and deprived it of the clear channel established under the North American Regional Broadcasting Agreement,¹⁹ filed petitions to intervene both before and after the proposed findings of fact were issued by the Commission.²⁰ Both petitions were denied, but KOA was permitted to file a brief *amicus curiae*. KOA thereupon appealed under section 402(b) as an aggrieved party, claiming no financial injury but merely electrical interference.

Agreeing in substance with the Court of Appeals for the District of Columbia,²¹ a majority of the United States Supreme Court felt that an allegation of substantial electrical interference was sufficient to permit an appeal by Station KOA²² and, by implication, denied that *FCC v. Sanders Brothers Radio Station* had limited the right of standing to appeal to financial injury alone. Without attempting to distinguish the dictum in the *Sanders* case, Mr. Justice Roberts apparently wished those injured electrically to have no more and no fewer rights than those injured financially.

Through a novel construction of the Communications Act of 1934, the majority opinion interpreted section 312(b),²³ which prescribes the procedure

18. *FCC v. NBC*, 63 Sup. Ct. 1035 (U. S. 1943), *aff'g*, *NBC v. FCC*, 132 F. (2d) 545 (App. D. C. 1942).

19. 55 STAT. 1005 (1941). For a discussion of the *KOA* case and of clear channels, see *Hearings before the Committee on Interstate and Foreign Commerce on Proposed Changes in the Communications Act of 1934*, 77th Cong., 2d Sess. (1941) 422-24, 692-93, 1040; DILL, *RADIO LAW* (1938) 108 *et seq.*

20. See Brief for Appellant, app., *NBC v. FCC*, 132 F. (2d) 545 (App. D. C. 1942) for a collection of the various documents in this case.

21. *NBC v. FCC*, 132 F. (2d) 545 (App. D. C. 1942), (1943) 31 GEO. L. J. 80.

22. See the dissenting opinion which agrees that if a person financially injured has standing to appeal, "so does one whose station will suffer from electrical interference," but does not believe that "KOA has sustained or is about to sustain any substantial electrical injury. 63 Sup. Ct. at 1047. Moreover, "if we accept as constitutionally valid a system of judicial review invoked by a private person who has no individual substantive right to protect but who has standing only as a representative of the public interest, then I think we must be exceedingly scrupulous to see to it that his interest in the matter is substantial and immediate." *Id.* at 1046.

23. 48 STAT. 1087 (1934), 47 U. S. C. § 312(b) (1940) provides: "Any station license . . . granted under the provisions of this chapter or the construction permit required hereby and hereinafter issued may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such actions will promote the public interest, convenience, and necessity, or the provisions of this chapter or any treaty ratified by the United States will be more fully complied with: Provided, however, That no such order of modification shall become final until the holders of such outstanding license or permit shall have been notified in writing of the pro-

for Commission modifications of radio licenses, as allowing the intervention of all third parties substantially affected. Without generalizing on the legality of the Commission's new rules on intervention, the Court held that under this section the Commission was obliged on the request of KOA, to make that station a party to the proceedings modifying the license of WHDH. The contention that the position of KOA as *amicus curiae* was a satisfactory substitute for its being made a party was not discussed. Thus the Court adopted the view, vaguely expressed in earlier cases, that this provision of the statute refers not only to direct modifications of licenses but also to constructive modifications which are brought about by means of a change in power, hours, or frequency of another licensee. It is difficult to determine whether the Court accorded a similar multi-party construction to section 303(f), which provides that modifications "shall not be made without the consent of the station licensee."²⁴ Mr. Justice Roberts mentioned the contention of NBC that this provision of the law also applied to constructive modifications, but did not specifically rule on it.²⁵ However, section 309(a),²⁶ which

posed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

But see the dissent of Mr. Justice Frankfurter which, in speaking of section 312(b), states: "I cannot read the requirement for 'reasonable opportunity to show cause why such an order of modification shall not issue' as a denial to the Commission of power to make such a reasonable rule for sifting the responsibility of potential intervenors." 63 Sup. Ct. at 1046.

24. 48 STAT. 1082 (1934), 47 U. S. C. § 303(f) (1940). This section gives the Commission power to "make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with."

25. But see headnote to the case of *FCC v. NBC* in 11 U. S. L. WEEK 4379 (U. S. 1943) which interprets the decision as allowing intervention under 303(f) and does not mention 312(b).

26. 48 STAT. 1082 (1934), 47 U. S. C. § 309(a) (1940) provides: "If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that the public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, removal or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

There is some evidence that a revision of section 309 was contemplated at one time. See *Hearings before the Committee on Interstate and Foreign Commerce on H. R. 10348*, 75th Cong., 3d Sess. (1938) 38, where Mr. Herbert Bingham, appearing on behalf of the Federal Communications Bar Association, said that "in all such cases we believe that due process as well as common justice requires that the right to participate be extended to all parties that feel and are able to demonstrate that they have a substantial interest in the subject-matter. . . ."

stipulates when a hearing must be held on an application for modification of a license, was said not to include third party licensees affected by the proposed change.

In a dissenting opinion concurred in by Mr. Justice Douglas, Mr. Justice Frankfurter dealt at length with the problem of intervention and the Commission's new rules and regulations concerning it. Pleading for flexibility in matters of administrative procedure,²⁷ he maintained that the majority's construction of 312(b) was contrary to Congressional intent and that the lower court's decision on section 1.102²⁸ of the Commission's rules and regulations too severely limited the Commission. This section, which had been construed to recognize no statutory right to intervene in *Matter of Hazlewood*,²⁹ was held by the Court of Appeals of the District of Columbia to be a violation of the Communications Act. In the *Hazlewood* proceeding, the Commissioners declared that the Commission could place on the petitioner the burden of proving his status as a representative of the public interest, and stated that a former rule, under which merely a disclosure of a substantial interest was sufficient for intervention, "was so broad and the Commission's practice under it so loose that intervention in Commission hearings came to be almost a matter lying in the exclusive discretion of persons seeking to become parties

27. 63 Sup. Ct. 1035, 1046 (U. S. 1943). He states: "To deny to the Commission the right to require a preliminary showing, such as was found wanting here, before admitting a petitioner to the full rights of a party litigant is to fasten upon the Commission's administrative process the technical requirements evolved by courts for the adjudication of controversies over private interests It is to assume that the modes familiar to courts for the protection of substantial interests are the only permissible modes regardless of the nature of the subject matter and the tribunals charged with the administration of the law."

Mr. Justice Frankfurter also quotes his words in *FCC v. Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940) that "necessarily . . . the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest."

See *Ward v. FCC*, 108 F. (2d) 486, 491 (App. D. C. 1939); SEN. DOC. NO. 186, 77th Cong., 3d Sess. (1940) 16-21 (especially the frank discussion of the dilatory tactics which grew up through the easy rules regarding interventions); *Hearings before the Committee on Interstate and Foreign Commerce on H. R. 10348*, 75th Cong., 3d Sess. (1938), 782-92 (a vigorous defense by Commissioner Fly in behalf of liberal rules of intervention).

28. This section provides: "Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding"

29. 7 F.C.C. Rep. 443 (1939). See (1940) 11 AIR L. REV. 73, 82 for a criticism of this Commission decision.

to Commission proceedings." ³⁰ Mr. Justice Frankfurter agreed with the Commissioners and emphasized the broad rule-making powers granted the Commission by Congress.³¹

Although the decision of the majority granting an appeal on the ground of electrical interference without financial injury constitutes an approval of a doctrine long recognized by the lower courts, its interpretation of the Communications Act with regard to intervention had apparently never before been suggested.³² If appeals were limited, the liberal rule of intervention prescribed by the Court would, of course, be desirable. But except in the rare case, an appeal may be had in any proceeding in which intervention is now permitted.³³ And since appellate courts have the power to review errors of law and the far broader power to remand when there is no substantial evidence on which to base the administrative decision, an appeal affords adequate protection to the rights of both applicants and third parties.³⁴ In view of the infor-

30. 7 F.C.C. Rep. 443, 444 (1939).

31. 48 STAT. 1068 (1934), 47 U. S. C. § 154(j) (1940) provides that "the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"

32. Brief for Appellant, pp. 24 *et seq.*, *NBC v. FCC*, 132 F. (2d) 545 (App. D. C. 1942) did suggest that section 303(f), because of the use of the phrase "change in frequencies" rather than "change of frequencies" meant that it was applicable to third-party stations. But Judge Rutledge in the court of appeals rested his construction of section 303(f) on broader grounds than these "prepositional hairsplittings," and the Supreme Court did not even consider the contention. The briefs did not, however, even suggest that section 312(b) might be similarly construed.

See 72 CONG. REC. 8052 (1930), where a "modification" is spoken of only in terms of the station whose license is actually altered; 1 SOLOW, *op. cit. supra* note 7, at 67, 100-03 for a similar interpretation of section 303(f).

33. The rare exceptions are those clear-channel cases where, because the stations may be many hundreds of miles from one another, any financial injury will not be substantial and also cases of non-profit broadcasting stations. See *NBC v. FCC*, 132 F. (2d) 545, 548-49 (App. D. C. 1942).

34. But *cf.* Note (1936) 45 YALE L. J. 934, 936: "And while a broadcaster whose license is about to be revoked or altered, or whose effective service area is to be curtailed by the granting of permission to another station to operate on the same wave length, is constitutionally entitled to be heard in opposition to such action, it does not necessarily follow that a broadcaster whose privilege may become less valuable because of the increased competition of a new station seeking a permit, or of a competitor seeking an extended time allotment, has the same right."

Yet the courts evidently want an objector to be heard during some stage of the proceedings. Only on such a basis can explanation be made for the dictum of *FCC v. Sanders Bros. Radio Station*, 309 U. S. 470, 476 (1940) that "it does not follow that, because the licensee of a station cannot resist the grant of a license to another, on the ground that the resulting competition may work economic injury to him, he has no standing to appeal from an order of the Commission granting the application." But *cf.* the dissenting opinion of Mr. Justice Douglas in *Scripps-Howard Radio v. FCC*, 316 U. S. 4, 20-21 (1942).

See, as to the requirement of due process, *Morgan v. United States*, 304 U. S. 1, 18 *et seq.* (1938); *Morgan v. United States*, 298 U. S. 468, 480 (1936); *Saginaw Broadcast-*

mality and flexibility sought to be achieved through the administrative commission³⁵ the Court's interpretation of the Act would, therefore, appear to be an unfortunate one; for to grant the Commission no discretion in the matter of who may be parties in its hearings is to formalize it and overburden it by subjecting it to the dilatory tactics of third-party licensees.

ing Co. v. FCC, 96 F. (2d) 554 (App. D. C. 1938) ; Symons Broadcasting Co. v. FRC, 64 F. (2d) 381 (App. D. C. 1933).

35. See Davis, *supra* note 7. The whole article is a study of non-formalistic substitutes which would satisfy the requirements of opportunity to be heard and due process in an administrative hearing and yet allow for an easy and adequate procedure. See also the examination and criticisms of the procedure of the Federal Communications Commission in SEN. DOC. No. 186, 77th Cong., 3d Sess. (1940) 8-42.